This report made at the early stages of the arrest, when the memory of the complainant was fresh with less likelihood of fabrication, would have offered the accused a chance to compare with what the complainant is now testifying in court.

In adopting the views of Chang Min Tat J in *Tan Cheng Kooi & Anor* v *PP*,[1] where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine the complainant.

Again as expressed by Gill J (as he then was) in *PP* v *Foong Chee Cheong*,[2] 'the absence of a first information report casts a cloud of suspicion and tends to weaken the prosecution case'.

Failure to produce this first information report is a very serious omission and is fatal to the prosecution since the whole of this case depended on the testimony of PW2 who implied that he did make a police report which would have been a first information report.

Again in full agreement with the decision of Smith J in *Teo Thin Chan & Anor* v *PP*,[3] failure to produce this first information report raises the presumption of s 114(g) of the Evidence Act 1950 that the report which could have been produced and not been produced would, if produced, have been unfavourable to the complainant.

Section 114(g) of the Evidence Act 1950 is hereby presumed against the prosecution in this case, and in view of the facts as stated above, the accused is thereby discharged and acquitted without having been called to make his defence to the charge.

Accused acquitted.

Solicitors: *Fernandez & Partners.*

Reported by *Mathavan Devadas*

Public Prosecutor v Paneerselvan & Ors

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47-19-88
EDGAR JOSEPH JR J
3 AUGUST 1990

Evidence — Corroboration — Former statement of witness — Probative value versus prejudicial effect — Evidence Act 1950, s 157

Words and Phrases — 'Statement' — Evidence Act 1950, s 157

Words and Phrases — 'At or about the time' — Evidence Act 1950, s 157

During the testimony of the prosecution's undercover agent, the prosecution sought to admit into evidence his written record of his meetings with the accused persons. These records were made soon after the witness's meeting with the accused persons.

Held, disallowing the prosecution's application:

(1) The object of s 157 of the Evidence Act 1950 was to admit statements made at a time when the mind of the witness was so connected with the events as to make it probable that his description of them would be accurate.

(2) 'Statement' in s 157 of the Evidence Act 1950 means 'something that is stated' and the element of communication to another person is not included in it.

(3) 'At or about the time' in s 157 of the Evidence Act 1950 means that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself.

(4) Once it was accepted that the statement is relevant and admissible, the court must decide if the probative value of the statement is outweighed by its prejudicial value. The undercover agent was, for all intents and purposes, an agent provocateur. In view of his role, it would be natural for him to support the prosecution case. Accordingly, out-of-court statements of the kind that was sought to be admitted would be of trifling weight. Their prejudicial value would however be considerable. The court would, therefore, in the exercise of its discretion exclude them as corrobation under s 157.

(5) The evaluation of the testimony of the witness, in particular, the assessment of his credibility, reliability and accuracy of recollection could only be performed at the close of the case for the defence, unless the testimony suffers from the defect of being so inherently incredible that no reasonable person could accept it as being true.

[Bahasa Malaysia summary

Semasa agen pengintip rahsia sedang memberi testimoninya, pihak pendakwa cuba memasukkan rekod bertulis yang dibuat oleh agen itu mengenai pertemuannya dengan tertuduh sebagai keterangan. Rekod itu disediakan sebaik sahaja saksi itu bertemu dengan tertuduh.

Diputuskan, menolak permohonan pihak pendakwa:

(1) Objek s 157 Akta Keterangan 1950 adalah untuk menerima kenyataan yang dibuat pada masa apabila fikiran saksi adalah begitu berkait dengan kejadian sehingga apa yang diterangkan oleh saksi itu menjadi sesuatu yang tepat.

(2) 'Kenyataan' di dalam s 157 Akta Keterangan 1950 bererti 'sesuatu yang dikatakan' dan elemen komunikasi kepada seorang yang lain tidak termasuk di dalamnya.

(3) 'Pada atau lebih kurang pada masa itu' di dalam s 157 Akta Keterangan 1950 bererti bahawa kenyataan itu mesti dibuat dengan segera atau sekurang-kurangnya sebaik sahaja satu peluang yang munasabah untuk berbuat demikian timbul.

(4) Setelah diterima bahawa sesuatu kenyataan itu relevan dan boleh diterima, mahkamah mesti memutuskan sama ada nilai probatif kenyataan itu diatasi oleh nilai kemudaratannya. Agen pengintip rahsia itu memang merupakan seorang agen provocateur. Memandangkan peranannya, adalah kebiasaan untuk dia menyokong kes pendakwa. Oleh yang demikian, kenyataan di luar mahkamah sebegini yang cuba dimasukkan hanya mempunyai pengaruh yang tidak penting. Nilai kemudaratannya agak tinggi. Mahkamah dengan ini, dalam menggunakan budibicaranya, tidak akan menerimanya sebagai sokongan di bawah s 157.

(5) Penilaian testimoni saksi itu, khususnya, penilaian kebolehpercayaan, kejujuran dan ketepatan kuasa ingatan kembalinya, hanya boleh dilakukan pada peringkat penutup kes pembelaan kecuali jika testimoni itu begitu tidak sempurna sehingga begitu mustahil untuk diterima oleh orang yang munasabah sebagai benar.]

Cases referred to

1 *BC Pandya* v *State of Bombay* AIR 1959 SC 356 (folld)
2 *M Rai* v *Emperor* AIR 1952 SC 54 (folld)
3 *Rameshwar* v *State of Rajesthan* AIR 1952 SC 54 (folld)
4 *Noor Mohamed* v *R* [1949] AC 182 (folld)
5 *Mohamed Ali* v *PP* [1962] MLJ 230 (refd)
6 *Lim Yam Hong & Co* v *Lam Choon & Co* AIR 1928 PC 127 (refd)
7 *PP* v *Khoo Boo Hock* [1990] CLJ 971 (distd)
8 *PP* v *Omar bin Daud & Anor* (Penang High Court Criminal Appeal No 3/84) (unreported) (distd)
9 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 40
Evidence Act 1950 ss 145, 155, 157, 159

Karpal Singh for the accused.
Kok Keng Fai (Senior Federal Counsel) for the Public Prosecutor.

Cur Adv Vult

Edgar Joseph Jr J: The prosecution is seeking to have admitted, as corroboration under s 157 of the Evidence Act 1950, certain statements which took the form of entries in 14 pages torn from an exercise book and corresponding entries in summary form, in a pocket notebook ('the statement') made for the purpose of an impending criminal prosecution, by Corporal Lian Kia Hock (PW4) whose role was that of an undercover agent in a trap which eventually led to the arrest of the three accused persons (A1, A2 and A3) who now stand charged with offences of trafficking in dangerous drugs and, in the alternative, with doing an act preparatory to trafficking in dangerous drugs, in contravention of the Dangerous Drugs Act 1952 ('the Act').

According to PW4, after his initial meeting with A1 and A2 on the night of 26 September 1985 at about 10.20pm, he returned from Gurney Drive, Georgetown, the scene of the alleged offences, to his room in the Rest House, and soon afterwards, at about 10.50pm commenced recording his statements aforesaid; first making entries in the first seven of the 14 pages and then making corresponding entries in his pocket notebook. The entries in the seven pages, he said, were a detailed account of what transpired at his meetings with A1 and A2 at the scene earlier that night, including a record in question and answer form of the conversations he claims he had had with A1 and A2. The corresponding entries in the pocket notebook were notes in summary form he had made in the seven pages.

Similarly, PW4 testified that after his meetings with A1 and A2 at the scene, early in the afternoon of 27 September 1985, and their arrest shortly thereafter on the same day, he had proceeded to the Cawangan Anti Dadah, Georgetown, where he remained until about 8pm when he left for the Rest House arriving there about 20 minutes later. He then began making entries in pp 7 to 14 of the 14 pages aforesaid at 9pm on the same night and then made corresponding entries in his pocket notebook in summary form. In the case of these entries as well, PW4 claimed that they were a detailed account of what transpired at meetings between him and A1 and A2 at the scene earlier that afternoon including a record in question and answer form, of conversations he claims he had had with A1 and A2. The corresponding entries in the pocket notebook were again notes in summary form of the notes he had made in pp 7 to 14 of the 14-page statement.

PW4 further stated that at the time he made all the above entries his recollection of the events recorded was fresh.

Section 157 of the Evidence Act 1950 reads as follows:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

First of all, I should point out, that the word 'statement' in s 157 means 'something that is stated' and the element of communication to another person is not included in it. Accordingly, it was held by the Supreme Court in India in *BC Pandya* v *State of Bombay*[1] notes of attendance prepared by a prosecution witness recording conversations that took place between him and other prosecution witnesses in connection with the defalcation made by the accused would be statements within the meaning of s 157 and would be admissible to corroborate his evidence.

The point has, however, been taken by the defence that neither the entries in the 14-page statement nor

those in the pocket book were made 'at or about the time' of the events to which they relate — an essential requirement of s 157.

There is no doubt that it is for the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement (*M Rai* v *Emperor*[2] at p 58). The primary test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. (See *Rameshwar* v *State of Rajesthan*[3] at p 58). The words 'at or about the time' must mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. The object of the section seems to be to admit statements made at a time when the mind of the witness is so connected with the events as to make it probable that his description of them would be accurate. (See *Woodroffe and Amir Ali on Evidence* (14th Ed) at p 3635.)

On the facts, although PW4 stated that he could have made the entries in the first seven pages of the 14-page statement and the corresponding entries in the pocket diary at an earlier stage in the New Zealand Restaurant, close to the scene, on the night of 26 September, I consider that his explanation that he did not do so because it was crowded and he had no paper with him is not an unreasonable one and therefore prima facie acceptable.

Another point taken by the defence was that it had been admitted by PW4 that in his notes he had referred to A1 and A2 as T1 and T2 respectively. It was argued that this suggested that the notes were made *after* A1 and A2 had been charged in court for otherwise PW4 would have referred to A1 and A2 by their names as he did in court. When PW4 was cross-examined as to this, he said it was just a coincidence. Again, PW4's explanation that this was a coincidence is not an improbable one and therefore prima facie acceptable.

As for the entries on pp 7 to 14 of the 14 pages aforesaid, and the corresponding entries in summary form in the pocket diary, the time which elapsed between the events concerned and the making of these entries is far greater than that when making the entries relating to the events on the night before.

But, PW4 explained that he did not make the entries at the Cawangan Anti Dadah on 27 September 1985 because he had left his notes and pocket book behind in his room in the Rest House. He added that while he was at the Cawangan Anti Dadah, there were lots of police personnel there and he offered that as another reason why he did not make the entries there then. Once again, I consider PW4's explanation for the delay is not an improbable one and therefore prima facie acceptable.

I am satisfied therefore that the prosecution have adduced sufficient prima facie evidence, at this stage, to satisfy the conditions laid down in s 157 so that technically the statements are admissible.

The matter however does not rest there for once it is accepted that the evidence objected to is relevant and admissible, then it is for the judge to exercise his discretion and reach a fair balance having regard to the interests of both the prosecution and the defence. In other words, I must next consider whether in the exercise of my discretion I should exclude the statements as corroboration under s 157 on the ground that their probative value is outweighed by its prejudicial effect in accordance with the principles enunciated by Lord du Parcq in the Privy Council case of *Noor Mohamed* v *R.*[4] In that case Lord du Parcq said:

> ...in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Clearly, the weight to be accorded to unsworn out of court statements will vary according to the circumstances. So, for example, in *Mohamed Ali* v *PP*[5] Ong J (as he then was) said, inter alia, at p 231:

> Neither was the police report of any genuine corroborative value even though it was admitted as corroboration under s 157 of the Evidence Ordinance 1950. As was said in *R* v *Whitehead* [1929] 1 KB 99, 102, a witness cannot corroborate himself, otherwise it is only necessary for him to repeat his story some 25 times in order to get 25 corroborations of it.

And, further down, on the same page, his Lordship added this:

> It will not be out of place to say a few words about s 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R* v *Baskerville* [1916] 2 KB 658. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' as it appears in s 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboratoin may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

In the Singapore Privy Council case of *Lim Yam Hong & Co* v *Lam Choon & Co*,[6] it was held that it is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself.

In the present case, PW4 was, at the material time, an undercover agent and, as such, an agent provacateur whose testimony would be protected under the provisions of s 40A (1) of the Act. Nevertheless, in view of his role it would be natural for him to support the prosecution case. Accordingly, out of court statements of the kind sought to be introduced here would, in my opinion, be of trifling weight. On the other hand, their prejudicial effect would be considerable. I would, therefore, in the exercise of my discretion exclude them as corroboration under s 157.

Looking back, it would be pertinent to say a few words about ss 27 and 159 of the Evidence Act 1950 as well as s 37A(1)(b) of the Act.

As regards s 27, decisions such as *PP* v *Khoo Boo Hock & Anor*[7] which stress the importance of a contemporary record of what really passed between an accused and a police officer as constituting information leading to a discovery must be read in their proper perspective. If this is done with a discerning eye, they can be readily distinguished on the ground that in those cases the police witnesses concerned were not undercover agents and the contemporary record recommended would be strictly limited to so much of such information as distinctly relates to such discovery and nothing more. Whereas, in the present case, the statements sought to be introduced were made by an undercover agent and purport to contain an exhaustive account of what passed between him and accused persons and they are sought to be introduced in examination-in-chief for the purpose of corroboration under s 157.

Having said that, however, I would hold that PW4 is at liberty to apply to the court to refresh his memory by reference to the statements in accordance with the requirements of s 159. On the other hand, the defence too may apply under ss 145(1) and 155(c) of the Evidence Act 1950, for leave to cross-examine PW4 by reference to his statements if they so wish. Needless to say, in either of these situations the applications will be considered on their merits.

As regards s 37A(1)(b), some arguments were pressed upon me by the learned deputy based upon my judgment in the unreported case of *PP* v *Omar bin Daud & Anor*[8] wherein I had admitted a contemporary note, being a record of cautioned interview of an accused person by a Deputy Superintendent of Police during an anti-drug trafficking raid at the house of the accused, 'on the ground that it was highly relevant and plainly admissible under s 157'. The circumstances in that case, however, were poles apart from those of the present case, since the note emanated from a police officer of no mean rank, the contents of which related to spontaneous verbal statements made by an accused person after a statutory caution was administered as soon as possible thereafter as required under s 37A(1)(b) of the Act.

It goes without saying that the evaluation of the testimony of PW4, in particular, the assessment of his credibility, reliability, and accuracy of recollection, like that of any witness in a criminal trial, is a task which can only be performed at the close of the case for the defence and after final addresses, unless, of course, that testimony suffers from the defect of being so inherently incredible that no reasonable person could accept it as being true. (See *Haw Tua Tau* v *PP*.[9]) Accordingly, nothing that I have said in this ruling should be construed as detracting from that principle.

Application disallowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Mathavan Devadas*

Guannex Leasing Sdn Bhd v Sebastian & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D2-23-842-87
ZAKARIA YATIM J
2 AUGUST 1990

Civil Procedure — Further arguments in open court — Whether application can be granted when there were no previous arguments — Rules of the High Court 1980, O 56 r 2(2)

The first and second defendants appealed against the registrar's decision to grant leave to the plaintiff to enter final judgment against the defendants. At the hearing of the appeal, the first defendant was present but without his counsel. The first defendant then asked for an adjournment in order to instruct new counsel. Counsel for the plaintiff objected on the ground that the appeal had already been adjourned three times for the same reason. The court refused to grant the adjournment and dismissed the appeal on the ground that the first defendant had about four months after discharging his solicitors to get new counsel and yet at the date of the hearing he had not done so; his request for a further adjournment to instruct new counsel was just an excuse to adjourn the hearing of the appeal. The first defendant then applied for further arguments in open court under O 56 r 2(2), and also lodged an appeal against the decision of the judge.

Held, dismissing the first defendant's application:

(1) As to whether the defendants were entitled to ask for further arguments in open court, it is clear that there must be an argument before the order is made in chambers, so that the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge. If there has been no argument at all in chambers, O 56 r 2(2) does not apply.